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BEFORE THE

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Federal Communications Commission

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WASHINGTON, D.C. 20554

AUG - 2 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of

RICHARD BOTT II
(Assignor)

and

WESTERN COMMUNICATIONS, INC.
(Assignee)

For Assignment of Construction
Permit of Station KCVI (FM),
Blackfoot, Idaho

) MM Docket 93-155
)
) File No. BAPH-920917GO
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TO: Administrative Law Judge Arthur I. Steinberg

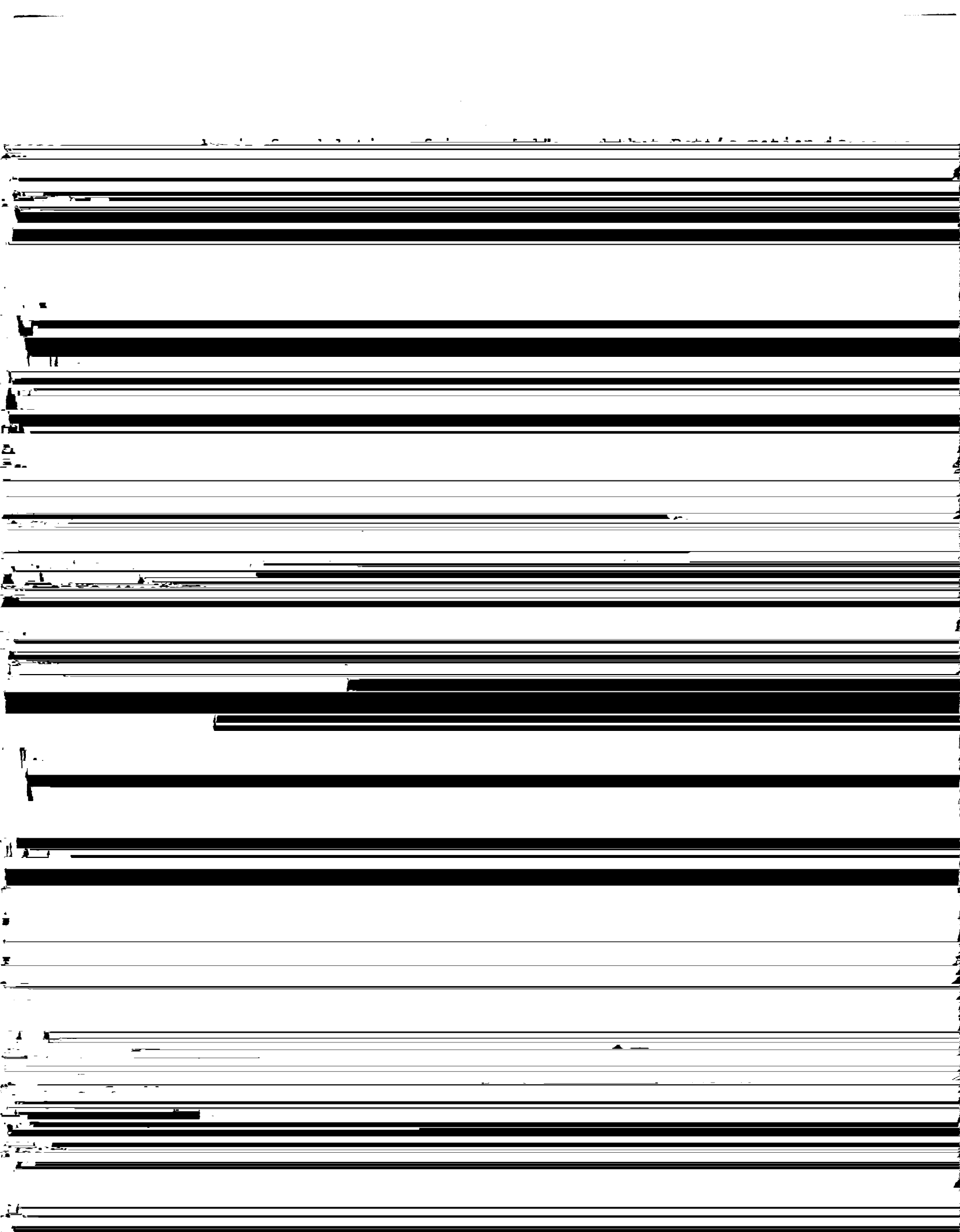
REPLY TO OPPOSITION
TO MOTION TO DELETE ISSUES

Richard P. Bott, II ("Bott"), by his attorneys, hereby replies to the Mass Media Bureau's Opposition, filed July 21, 1993, to his Motion to Delete Issues. In reply, Bott states the following:

1. The Bureau's brief opposition quotes two statements from the Hearing Designation Order¹ and then claims that "these statements clearly set forth the basis for designating the above-captioned applications for hearing, and...neither [statement] is based on an erroneous premise or a misstatement of any key fact." Oppos. ¶ 3. The Bureau then proceeds to argue that Bott's "sole basis" for seeking deletion of Issue (a) is his disagreement with "the HDO's characterization of the facts[.]", that this "is not a

¹ FCC 93-290, rel. June 15, 1993, 58 Fed. Req. 33819.

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incorrect legal standard, there has been no "reasoned analysis" and Atlantic does not bar a subordinate official from entertaining a motion to enlarge or delete issues. The Bureau itself has said that this is the correct view of Atlantic. See Bureau's Opposition to Request to Certify Matter to the Commission, filed July 17, 1984 in MM Docket 84-576 (copy attached as Exhibit A). The law has not changed in this regard since the Bureau took this position in 1984. Whether or not the Bureau had ever taken that position, however, it is the obviously correct position.³ Any other view of Atlantic denies that the Commission intended the term "reasoned analysis" to be applied in accordance with the English language.

4. In this case, the HDO rests entirely on one critical error. It is this: the Commission was led to believe that Bott had given a declaration in 1992, in support of the assignment application, which was diametrically opposed to his 1987 testimony in the Blackfoot comparative case, concerning his decision to use a particular format. Virtually everything in the HDO of a factual nature is colored by that critical error. For example, the first of two statements from the HDO quoted in the Bureau's opposition arises entirely in the context of the Commission's view that an absolute contradiction existed between Bott's 1992 declaration and

the Commission to grant his permit...". (Emphasis supplied.) The "qualification" is that which the Commission erroneously found to have been acknowledged by Bott in 1992 (see, HDO ¶ 9) and to have been denied by Bott in his 1987 testimony. Id. (It is obvious that the quotation extracted by the Bureau from ¶ 10 is, except in this context, meaningless. All permittees choose a format, without which they cannot make programming decisions. Indeed, as shown by Bott in his pending "Petition for Certification to Commission" at ¶ 9, the Commission itself acknowledged this in Eagle 22, Ltd., 7 FCC Rcd 5295 (1992).) The Bureau has now, even while opposing Bott's motion to delete issue, admitted that it knows of no evidence supporting the claimed contradiction between Bott's 1992 declaration and his 1987 testimony upon which the HDO is predicated. See, Bureau's "Response to Request for Admission", July 20, 1993 (Exhibit B hereto). In view of its admission, Bott submits that the Bureau's position opposing deletion of Issue (a) is without logic and finds no support in Atlantic.

5. As Bott has shown, the HDO also contains a failure of legal analysis. HDO ¶ 12 is wholly at odds with Eagle 22, Ltd., supra. See, "Petition for Certification to Commission" at ¶¶ 11-15. The Bureau's second quoted statement from the HDO comes from ¶ 13 thereof. Immediately prior to that selected quotation the Commission has, in HDO ¶ 12, applied a legal standard which is

matters, it would seem. While ¶ 12 says, in no uncertain words, that the application cannot be granted, the Communications Act deprived the Commission of the power to deny it without designating it for hearing. HDO ¶ 13 labeled, "conclusion", is in truth the empty caboose at the end of the train. It does not, contrary to the Bureau's claim, set forth a basis for a hearing unless that basis can be found in the first twelve paragraphs of the HDO.⁴ And those paragraphs provide no basis except factual error and incorrect legal analysis.

⁴ The Bureau has previously quoted this portion of HDO ¶ 13, and has done so incorrectly as it does here. The Bureau leaves out the phrase "or the instant assignment proceeding", which shows the origin of this ¶ 13 sentence in HDO ¶¶ 3 and 9.

CONCLUSION

The Presiding Judge should conclude, based upon his independent examination of the Hearing Designation Order and the pleadings filed herein by Bott and the Bureau, that Issue (a) should be deleted. With the Bureau's Response to Bott's Request for Admission in hand, and with the law as determined in Eagle 22, Ltd. firmly in mind, a specific factual basis for continuing the trial of Issue (a) cannot be articulated, and has not been articulated by the Bureau.

Respectfully submitted,

RICHARD P. BOTT, II

By: 

James P. Riley
Kathleen Victory
His Attorneys

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July 16, 1993

Exhibit A
RECEIVED
JUL 18 1984

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FLETCHER, HEALD
& HILDRETH

In re Applications of)	
)	
KCBD Associates)	MM DOCKET NO. 84-576
)	File No. BRCT-830516KE
For Renewal of License of)	
Station KSWs-TV, Channel 8)	
Roswell, New Mexico)	
)	
KCBD Associates)	MM DOCKET NO. 84-577
(Assignor))	File No. BALCT-830609KO
and)	
Caprock Telecasting, Inc.)	
(Assignee))	
)	
For Assignment of License of)	
Station KSWs-TV, Roswell)	
New Mexico)	
)	
Caprock Telecasting, Inc.)	
(Assignor))	
and)	
The Stanley S. Hubbard Trust)	MM DOCKET NO. 84-578
(Assignee))	File No. BALCT-830609KP
)	
For Assignment of License of)	
Station KSWs-TV, Roswell,)	
New Mexico)	

MASS MEDIA BUREAU'S OPPOSITION TO REQUEST TO
CERTIFY MATTER TO THE COMMISSION

1. On June 29, 1984, The Stanley S. Hubbard Trust ("Hubbard") filed a request to certify to the Commission the Hearing Designation Order ("HDO"), 49 Fed. Reg. 26295, published June 27, 1984. Hubbard seeks certification

FCC 2d 1139, 1150 (1978). A close reading of Radio Carrollton discloses that this standard applies only to a situation where an allegation of a "strike" petition to deny is made.

4. The Bureau urges, however, that certification to the Commission is not warranted. In our view, since the HDO made reference to the wrong standard, Hubbard technically is not barred by Atlantic Broadcasting Co., 5 FCC 2d 717 (1966) from properly raising its allegations in a petition to

release from the Commission. See Section 1.220 of the Commission's Rules. Accordingly,

CERTIFICATE OF SERVICE

Jodi Allen, a legal clerk in the Hearing Branch, Enforcement Division, Mass Media Bureau, certifies that she has on this 17th day of July 1984, sent by regular United States mail, U.S. Government frank, copies of the foregoing "Mass Media Bureau's Opposition to Request to Certify Matters to the Commission" to:

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Office of General Counsel
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Washington, D.C. 20553

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Washington, D.C. 20005
Counsel for KCBF Associates and for
Caprock Telecasting, Inc.

Jodi Allen

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In re Application of)	MM DOCKET NO. 93-155
)	
RICHARD BOTT II)	File No. BAPH-920917GO
(Assignor))	
)	
and)	
)	
WESTERN COMMUNICATIONS, INC.)	
(Assignee))	
)	
For Assignment of Construction)	
Permit of Station KCVI (FM),)	
Blackfoot, Idaho)	

To: Richard Bott II

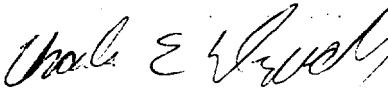
MASS MEDIA BUREAU'S RESPONSE
TO REQUEST FOR ADMISSION

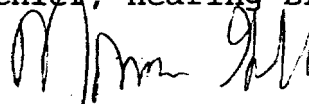
Pursuant to 1.246(b)(2) of the Commission's Rules, the Mass Media Bureau hereby responds to the Request for Admission filed by Richard Bott II ("Bott") on July 16, 1993. The Bureau submits that portions of the request are improper in that they request the Bureau to admit to statements made or not made by Bott. Instead, the Bureau suggests and will admit to the truth of the following revised admission:

The Bureau does not possess a copy of a written statement or transcript of an oral representation by Bott to the Commission in which Bott asserts that throughout the six-year effort to obtain his permit he maintained a good faith intention to operate KCVI as a commercial facility with a religious format or that

throughout the comparative proceeding, he always intended to operate with a commercial religious format.

Respectfully submitted,
Roy J. Stewart
Chief, Mass Media Bureau


Charles E. Dziedzic
Chief, Hearing Branch


Norman Goldstein


Y. Paulette Laden
Attorneys
Mass Media Bureau

Federal Communications Commission
2025 M Street N.W., Suite 7212
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(202) 632-6402

July 20, 1993

CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch Mass Media Bureau, certifies that she has, on this 20th day of July, 1993, sent by regular United States mail, U.S. Government frank, copies of the foregoing "Mass Media Bureau's Response to Request for Admission" to:

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Administrative Law Judge Arthur I. Steinberg
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Michelle C. Mebane
Michelle C. Mebane

CERTIFICATE OF SERVICE


I, Roberta Wadsworth, a secretary in the law offices of Fletcher, Heald & Hildreth, hereby certify that I have on this 2nd day of August, 1993, had copies of the foregoing "REPLY TO OPPOSITION TO MOTION TO DELETE ISSUES" mailed by U.S. Mail first class, postage prepaid, to the following:

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Roberta Wadsworth

* denotes hand delivery